(2)

No. 00-41

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

M.J.B.,

Petitioner,

—v.—

V.C.,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Does the Due Process Clause of the federal Constitution prevent state law from directing that children be allowed to visit with an adult who, with the consent of their biological parent, established a bonded parental relationship with them, who lived with them, and who assumed the day to day responsibilities of a parent for their care, education, emotional and financial support?

LIST OF PARTIES

Initials were used to denote the parties in the New Jersey Supreme Court, and are being used in this Court as well. The parties' full names are contained in the pleadings of the Superior Court, Chancery Division, Family Part, Essex County, New Jersey.

Petitioner (Defendant in Superior Court): M.J.B.

Respondent (Plaintiff in Superior Court): V.C.

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The opinion of the New Jersey Supreme Court is reported as *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539 (2000). The opinion of the New Jersey Superior Court, Appellate Division is reported as *V.C. v. M.J.B.*, 319 N.J. Super. 103, 725 A.2d 13 (1999). The decision of the New Jersey Superior Court, Chancery Division, Docket No. FD-07-875-98 is unpublished.

JURISDICTION

Petitioner has properly invoked jurisdiction under 28 U.S.C.§1257(a).

STATUTORY PROVISIONS INVOLVED

N.J.S.A. § 9:2-3: When the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgements or orders concerning care, custody, education and maintenance as concerning a child whose parents are divorced....

N.J.S.A. § 9:2-4: The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal....

N.J.S.A. § 9:2-13(f): The word "parent," when not otherwise described by the context, means a natural parent or parent by previous adoption.

STATEMENT OF THE CASE

A. The Relationships That Gave Rise To The Case

Although, as petitioner says, some aspects of the relationships at the heart of this case were vigorously disputed, the New Jersey Supreme Court found that the following facts were established at the trial in this case (*cf.* Sup.Ct. Rule 15.2). 163 N.J. at 206-212; Certiorari Petition, Appendix A, pp. 2a-7a ("App.").

The two women who are the parties in this case, V.C. and M.J.B., met in 1992 and began dating on July 4, 1993. M.J.B. started seeing a fertility specialist a few days later. She told V.C. about her decision to have children in September. V.C. and M.J.B. moved in together in December. Two months later, M.J.B. learned that she was pregnant. She called V.C. at work to tell her the good news. Later M.J.B. would learn she was having twins. 163 N.J. at 206, App. A, pp. 2a-3a.

V.C. and M.J.B. attended pre-natal and Lamaze classes together. In April 1994, they moved to a bigger apartment to accommodate the pending births. The children were born on September 29, 1994. V.C. took M.J.B. to the hospital. V.C. was present in the delivery room, and the hospital staff treated her as if she were a mother. Immediately after the birth, the nurses gave one twin to M.J.B. to hold and one to V.C. 163 N.J. at 207, App. A, p. 3a.

V.C. and M.J.B. opened joint bank accounts for their household expenses, prepared wills, powers of attorney, and named each other as the beneficiaries of their life insurance policies. They also opened savings accounts for the children, naming V.C. as custodian on one account and M.J.B. as custodian on the other. 163 N.J. at 207, App. A, pp. 3a-4a.

V.C. and M.J.B. decided that the twins would call M.J.B.

"mommy" and V.C. "meema." M.J.B. concedes that she referred to V.C. as the "mother" of the children. During the 23 months after the children were born and before she ended her relationship with V.C., she supported the notion, both publicly and privately, that she, V.C. and the children were a family unit. She told V.C. and others she considered V.C. the children's mother. M.J.B. sent cards and letters to V.C. that referred to V.C. as the children's mother and indicated that the four of them were family. She listed V.C. as the "other mother" on the children's pediatrician and day care registration forms. She gave V.C. medical power of attorney over the children. Labels aside, in fact both parties cared for the children, and V.C. assumed substantial responsibility for them. At trial, experts for both parties would testify that V.C. had a bonded relationship with the children, with V.C.'s expert saying she was a "maternal figure" and M.J.B.'s believing the children saw her as a member of their family. 163 N.J. at 207-208, 210-212, App. A, pp. 4a-5a, 7a-9a.

V.C. and M.J.B. bought a home together in February 1995. Later that year, V.C. asked M.J.B. to marry her, and M.J.B. accepted. In July, they held a commitment ceremony at which V.C., M.J.B. and the children were blessed as "family." V.C., M.J.B. and the twins attended family functions, holidays and birthdays. The twins called V.C.'s mother "grandma" and her grandmother "great-grandma." V.C. and M.J.B. joined an association of lesbian and gay families and attended at least ten of their functions. 163 N.J. at 209, App. A, pp. 5a-6a.

V.C. and M.J.B. discussed changing the twins' surname to a hyphenated form of their last names. They also discussed the possibility of V.C. adopting the twins (a process permitted under New Jersey law, *see* N.J.S.A. § 9:3-43(a) ("Any person may institute an action for adoption... ."); *see also Adoption of Two Children by H.N.R.*, 285 N.J.Super. 1, 666 A.2d 535 (1995) (statute which permits "any person to institute an action for

adoption" includes unmarried couples, either heterosexual or homosexual)). In June 1996 they consulted an attorney, paid a retainer and got advice about how to start the process. They had taken no further steps when M.J.B. ended her relationship with V.C. just two months later. 163 N.J. at 209-210, App. A, pp. 6a-7a.

V.C. and M.J.B. took turns living in the house with the children until November 1996. In December, V.C. moved out. V.C. continued to visit with the twins until May 1997. During that time, V.C. spent roughly every other weekend with the twins, and contributed money toward the expenses of the household. In May, M.J.B. went out of town on business for two weeks, leaving the twins with V.C. After returning, she cut off all contact between V.C. and the twins, and at some point stopped accepting money from V.C. 163 N.J. at 210, App. A, p. 7a. In July, V.C. filed the petition that gave rise to this case.

B. Proceedings Below

V.C.'s petition sought joint legal custody of the twins; that is, she asked the court to order regular visitation, and joint decision making. She did not seek physical custody of the children. 163 N.J. at 210 and at n.2, App. A, p. 7a and at n.2.

At trial, the court heard testimony from nine witnesses. Both V.C. and M.J.B. took the stand. Both called expert witnesses who had examined the women individually, with the children and who had examined the children separately. V.C.'s mother testified, as did four family friends. 163 N.J. at 208-209, 210-212, App. A, pp. 5a, 7a-9a.

The trial judge recognized that an individual who is neither a biological nor an adoptive parent can nonetheless have a parental relationship with a child under New Jersey law. Relying on cases from the Appellate Division, he concluded that V.C. was not a parent under New Jersey law, and that state law

therefore did not give her the right to bring an action for custody or visitation. In reaching that conclusion, the judge gave significant weight to the fact that the decision to have children was M.J.B.'s, and not a joint decision. 163 N.J. at 212-213, App. A, pp. 9a-10a; and *see* Cert. Pet., App. C at pp. 105a-109a.

A divided Appellate Division reversed. The majority held that V.C. had established that she had a parent-child relationship with the twins for the purposes of New Jersey law. Based on the record developed in the trial court, the Appellate Division ruled that joint legal custody would not be in the best interests of the children. Relying on the testimony of both experts, the court held that visitation was in the children's best interests, and remanded the case for proceedings to establish a visitation schedule. 163 N.J. at 213, App. A, p.11a; and *see* App. B, p. 55a-68a.

There were two partial dissents, taking opposite positions on the issues. One judge agreed that V.C. was a parent under New Jersey law, but would have remanded for a further hearing on whether custody might be appropriate. The other judge, again recognizing that neither biology nor an order of adoption is essential to parenthood under New Jersey law, believed a test different than that used by the majority should apply. Using his analysis, V.C. would not have been a parent, so he would have affirmed.163 N.J. at 213, App. A, p.11a, and *see* App. B, p. 69a-94a.

The New Jersey Supreme Court unanimously affirmed the decision of the Appellate Division. Writing for the court, Justice Long announced a four part test for deciding when an individual who is not biologically related to a child and has not obtained an order of adoption has a parental relationship with the child. To be recognized as a parent, the court held, an individual must prove: (1) that a biological or adoptive parent consented to and fostered the formation of a parent-like relationship between

the individual and the child; (2) that the individual lived in the same household with the child; (3) that the individual assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributions toward the child's support; and (4) that the individual established a bonded, dependent, parental relationship with the child. 163 N.J. at 223, App.A, pp. 24a-26a.

The court went on to hold that V.C. had met her burden on all four points, and had a parent-child relationship with the twins under New Jersey law. The court observed that the issue of joint physical custody was not before it because V.C. had not sought it. Observing that V.C. had not been involved in decision making for the twins in the nearly four year pendency of the case, the court ruled that it would be too disruptive to alter the arrangement, and thus declined to order joint legal custody. But, noting that V.C. had been visiting with the twins during the case, the court ruled that it was in the twins best interest that regular visitation continue. 163 N.J. at 229-230, App. A, 33a-34a

REASONS FOR DENYING THE WRIT

A. Introduction

The New Jersey Supreme Court ruled as a matter of state law that V.C. had a parent/child relationship with the twins she and M.J.B. raised together after finding:

(1) that M.J.B. consented to V.C. forming a parent-like relationship with the children, and actively promoted it;

(2) that V.C. lived with the children in one household, as a family;

(3) that V.C. assumed the obligations of a parent, taking significant responsibility

for the care, education and development of the children, and contributing toward their support;

(4) that V.C. had a bonded parental relationship with the children, who were dependent on her. 163 N.J. at 229, App. A, p. 33a.

The court ordered that V.C. be allowed visitation with the children. 163 N.J. at 229, App. A., p.34a.

M.J.B. asks this Court to rule as a matter of federal constitutional law that no matter what New Jersey law says, V.C. does not have a parent-child relationship with the children and may not be granted visitation. Cert. Pet. at 3. M.J.B. urges this Court to find in the Due Process Clause of the Fourteenth Amendment, two new limitations on the discretion of state courts in cases about parenting and visitation. Essentially, petitioner asks that this Court announce a *per se* rule (1) that only someone related biologically to a child may be said to be a parent under state law; and (2) that no one other than a parent may be granted visitation with a child unless the child's parent is unfit or the parent's decision to deny visitation has or would cause serious harm to the child. Cert. Pet. at 12-15.

B. Questions About The Limits Which The Federal Constitution May Place On State Law Decisions About Visitation And Parenting Are Not Well Posed By This Case

The rule that M.J.B. requests is extreme; it would overturn large bodies of existing state law. But the facts of this case do not lend themselves to the formulation of more temperate constitutional doctrine. Moreover, because the federal constitutional issue M.J.B. urges here was hardly developed at all in the New Jersey courts, this case does not provide this

Court with the kind of thoughtful treatment of the issues which it ought to have before it considers a relatively unexplored area of constitutional law.

The state courts, which have to deal with disputes about parenting and visitation day in and day out, have adopted several different analytic models for resolving them. Those analytical frameworks are typically flexible, circumstance dependent, and fact intensive.

For example, many courts hold that a man who is neither a biological nor an adoptive parent, but who is shown to have acted as a parent and held himself out as a parent, may not invoke the lack of a biological or adoptive tie to escape support obligations.[1] Courts have held that children and adults related by neither blood nor adoption, were, once a parent-child relationship was proven, to be regarded legally as parent and child for the purposes of determining support obligations from child to parent[2], from parent to child,[3] and from each to the other.[4]

Many courts have also ordered visitation, over the objection of a parent, to individuals who were neither adoptive nor biological parents when they were able to prove that they

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1. *See, e.g., Wener v. Wener*, 35 A.D.2d 50, 312 N.Y.S.2d 815 (2d Dep't 1970); *see also Jensen v. Jensen*, 13 N.J.Super 155, 80 A.2d 244 (1951) and *Tyler v. Tyler*, 671 S.W.2d 492 (Tenn. App. 1984).

2. See *Sparks v. Hinckley*, 5 P.2d 570 (Utah 1931).

3. *See Maguinay v. Saudek*, 37 Tenn. 146 (1857).

4. *See Eaves v. Feares* 64 S.E. 269 (Ga. 1908); *see also London Guarantee & Accident Co. v. Smith*, 64 N.W.2d 781 (Minn. 1954) (granting parental immunity for negligence to stepparents because they assumed the duties of parents).

had in fact acted as the child's parent.[5] The decision in this case, holding that a women's same sex partner had developed a parent-child relationship with children they raised together, does not by any means stand alone.[6]

Cases involving state law determinations that someone other than a biological or adoptive parent was in fact a parent have come to this Court before without provoking any apparent concern that the state in question had transgressed a fundamental constitutional right. Indeed, the relationship of a child and the nonbiological, nonadoptive parent who cared for her is invoked regularly as a leading exemplar of the kind of parent/child relationship the Constitution protects. *See Prince v. Massachusetts*, 321 U.S. 158, 159, 164-167. (1944) (Sarah Prince, the parent in *Prince*, was the "aunt and custodian" of Betty Simmons, the child).

And as this Court noted only last term in *Troxel v. Granville*, every state now has some form of statute which allows visitation in some circumstances to individuals who are not in any sense parents under state law. *See Troxel v. Granville*, ___U.S.___, ___, 120 S.Ct. 2054, 2064, n.1 (2000).

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5. *See Quinn v. Mouw-Quinn*, 552 N.W.2d 843 (S.D. 1996)(court may grant visitation to mother's ex-husband because he was only father child knew in seven years of life); *see also Koelle v. Zwiren*, 672 N.E.2d 868 (Ill.App. 1996)(similar); some courts have gone even farther, *see, e.g., In re Adoption of Young*, 364 A.2d 1307 (Pa. 1976)(mother estopped from terminating former husband's parental rights, even though he was not in fact biological father, because he had acted as father and been treated as father by the mother); *see also In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995).

6. *See Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995)(applying the four factors also used in this case to decide if biological mother's lesbian former partner was entitled to visitation as a parent); *see also J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa.Super.Ct. 1996)(biological mother's lesbian former partner could make case for visitation if she first proved she functioned as parent of the child; *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)(same).

While some of these laws apply only to grandparents, others are more general and apply to those who have a significant relationship with a child.[7]

All of these decisions and statutes would be swept aside by the federal constitutional rules which M.J.B. proposes. In place of detailed inquiry into the particular facts about relationships between adults and children, she would have this Court place an absolute federal rule that only those who are related by biology can have a parental relationship with a child, and visitation with nonparents can never be required absent unfitness or serious harm. *See* Cert Pet. at 12-15. Her test would, in short, supplant significant portions of the state law of domestic relations with a new federal law of domestic relations, something this Court has already suggested would be unwise, *see Troxel v. Granville*, 120 S.Ct. at 2064.

Moreover, this is hardly the case in which to explore whether some constitutional rule other than that proposed by M.J.B. should limit state law rules about parenting and visitation. Just as the Due Process Clause of the federal Constitution places some limits on when a state may refuse to include an individual within its definition of who is a parent (*see Stanley v. Illinois,* 405 U.S. 645 (1972)) or who may be awarded visitation over the objections of a parent (*see Troxel v. Granville*, 120 S.Ct. at 2059-61, 2064), it probably places some limits on the circumstances in which a state may decide that an adult has a parental relationship with a child and order visitation. The much discussed but as yet unmaterialized case of the day care worker whom a state court deems a parent would doubtless

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7. *See, e.g.*, Ariz. Rev. Stat. §25-415(G)(1)(West 2000)(requiring a substantial relationship), Minn. Stat. § 257.022(2b)(West 1999)(requiring that the adult and the child have lived together), Tex. Fam. Code § 102.003(a)(9)(West 1999)(same), and 1999 Nev. Stat. 125A.330(3)(1) (requiring that adult had previously provided financial support for the child).

be an example, if it ever happened. *See* Cert. Pet. at 10.

But this case does not begin to approach those limits, whatever they may be. V.C. is not a day care worker, or a nanny or a family friend. Under the richly nuanced tests developed by the courts of New Jersey, applied after a full trial with detailed testimony, V.C. is a woman who, with M.J.B.'s consent and encouragement, forged a parent-child bond with the children with whom she lived, for whom she cared, and whom she supported, emotionally and financially.

Finally, this case does not give this Court the kind of record which it ought to have before it explores the limits which the federal Constitution puts on state law rules about parenting and visitation. It is true that, at least in passing, petitioner asserted a federal constitutional right to control the upbringing of the twins. *See* New Jersey Supreme Court, Brief of M.J.B., at pp. 29, 30. But in each instance, she followed her mention of the federal Constitution with the insistence that absent "a statutory basis for jurisdiction" or "common law precedent" the New Jersey court should not allow any one like V.C. to demonstrate that in fact she had a parental relationship with a child. *See* Brief of M.J.B. at pp. 30, 31. Her brief reads as if she is arguing not that her federal constitutional rights are being violated, but rather in support of a policy argument about how the New Jersey Supreme Court should interpret the statute before it.

Given the way M.J.B. mentioned the federal Constitution, it is hardly surprising that there was no discussion at either the Appellate Division or at the New Jersey Supreme Court about how and why the Due Process Clause of the federal Constitution ought to limit the ability of states to define parents either in the way M.J.B. suggests, or in some other way. That lack of discussion leaves crucial questions about the consequences of the rules M.J.B. seeks completely unexplored.

For example, M.J.B. speaks in her petition to this Court of the exclusive rights of biological parents. She does not say if she thinks those whom state law deems parents by virtue of an order of adoption are similarly not parents for federal constitutional purposes. That is a position which, if adopted by this Court, would work a cataclysmic upheaval in families across America. But she also does not suggest why, if parents by adoption are to be treated like biological parents, the Due Process Clause would draw a distinction between two different court proceedings which can bring about an order that one is a parent under state law, condemning a proceeding like the one in this case which involves a full evidentiary hearing with the right to call and cross examine witnesses, while approving the far more informal proceedings typically used in adoptions.

Because M.J.B. did not seriously argue the constitutional issue she advances now to either the Appellate Division or the New Jersey Supreme Court, this Court does not have the benefit of the thinking of any other court on whether, how and why the Due Process Clause should be setting the basic rules for the states on parenting and visitation. The process of exploring the very complex constitutional issues M.J.B. poses should not begin in this Court. *See McCray v. New York*, 461 U.S. 961, 963 (Stevens, J., joined by Powell and Blackmun, J.J., opinion explaining vote to deny *certiorari* because Court's consideration of novel constitutional issue would benefit from further development in lower courts).

Because the rule M.J.B. poses would work an extreme change in the day to day operations of state courts, because the facts of this case do not properly frame any questions about whether the Constitution might require some more modest limit on state courts than the one M.J.B. proposes, and because these issues are in effect raised seriously for the first time in this Court, this is not an appropriate case for *certiorari*.

C. The Decision Of The New Jersey Supreme Court In This Case Is Not Inconsistent With This Court's Decision In *Troxel v. Granville*

For two distinct reasons, this Court's decision last term in *Troxel v . Granville* has no direct bearing on this case.

First, *Troxel* involved a statute which used "best interests of the child" to sort out visitation disputes between parents and third parties. The New Jersey statute at issue in this case uses the best interests standard to sort out visitation disputes between two parents. N.J.S.A. § 9:2-3 (West 2000). Ultimately, this Court condemned the Washington state statute at issue in *Troxel* because it gave no deference at all to the views of a parent in a dispute with a nonparent. *See Troxel v. Granville*, 120 S.Ct. at 2061. Nothing in *Troxel* remotely suggests that the Due Process Clause requires a state to give deference to the views of one parent over another in a dispute between parents. And nothing in *Troxel* speaks directly or indirectly to boundaries on whom a state may decide has a parental relationship with a child.

Second, putting aside for a moment the New Jersey Supreme Court's determination that V.C. is a parent, the process that court used to decide if V.C. could seek visitation could not be more different than the process at issue in *Troxel.*

This Court described the Washington state statute which it struck down in *Troxel* as "breathtakingly broad." The statute allowed "*[a]ny person*" to file a petition for visitation "*at any time*" and it empowered the court to grant the petition whenever it thought visitation would serve "*the best interests of the child.*" *Id.* (emphasis in this Court's opinion).

The New Jersey statute at issue in this case allows a petition to be filed only when the parents of a minor child begin to live separately, or are about to separate. N.J.S.A. § 9:2-3. As construed by the New Jersey Supreme Court, for an individual

like V.C. to obtain the right to seek visitation, she must prove that she has a bonded parent/child relationship with the child in question, that the child is dependent on her, that the biological parent consented to the formation of the relationship and promoted it, that she lived with the child, and that she took significant responsibility for the child's care, education and development, including both financial and emotional support. 163 N.J. at 223.

This is not a case in which a state has said that *any person* may petition for visitation; on the contrary, only one who has proven that she is an integral part of the child's life, and has the same sort of day to day practical, emotional, and financial relationship that a parent ought to have with a child may petition. This is not a case in which a state has paid no heed to the wishes of a biological parent. No petition will be entertained until the individual seeking visitation proves that the biological parent consented to the formation of that day to day parent-child relationship and indeed fostered its development into a bonded, dependent relationship. 163 N.J. at 223.

If *Troxel* speaks to this case at all, it is to suggest that this Court has serious reservations about imposing on state courts, as a matter of federal constitutional law, the kind of *per se* rules M.J.B. wants. As the *Troxel* opinion put it:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 9 (dissenting opinion). Because much state-court adjudi-

> cation in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter. [footnote omitted].

Troxel v. Granville, 120 S.Ct. at 2064.

The New Jersey Supreme Court's decision in this case violates neither the letter nor the spirit of this Court's decision in *Troxel.*

D. There Is No Significant Conflict Among State Courts On The Federal Constitutional Question Petitioner Poses

Petitioner tells this Court that the New Jersey Supreme Court's decision in this case conflicts with the decisions of other state courts. It is true that there is disagreement among state courts about how to define parental relationships and when to award visitation, although there are more courts aligned with the New Jersey Court's decision than petitioner cares to acknowledge. Cert. Pet. at 12, 14-15; and *see Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), and *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa.Super.Ct. 1996); *see also Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), *Quinn v. Mouw-Quinn*, 552 N.W.2d 843 (S.D. 1996) and *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill.App. 1996), to name a few.

But for the most part, the conflict is over how *state* law defines a parent, and when *state* law permits visitation. *See* e.g. *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991)(the principal case on which M.J.B. relies). Some would view the disagreement about state law among these courts as a reflection of a healthy federal system in operation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis,

J., dissenting). In any case, disagreements among state courts about matters of state law are hardly a reason for this Court's intervention.

One of the cases to which petitioner points as a part of the purported conflict–*Ronald F.F. v. Cindy G.G.*, 70 N.Y.2d 141, 517 N.Y.S.2d 932 (1987)–holds that Due Process Clause of the federal Constitution requires that the state have a compelling interest to order visitation over the objections of a biological parent. It finds on the facts before the court that the state has no such interest. *Ronald F.F. v. Cindy G.G.*, 70 N.Y.2d at 144-145, 517 N.Y.S.2d at 934. The discussion of the issue takes two sentences, and involves virtually no analysis. The court in *Ronald F.F.*, like the New Jersey Supreme Court in this case, did not take up the question of whether the Due Process Clause limits state definitions of who is a parent at all. *Ronald F.F. v. Cindy G.G.* 70 N.Y.2d at 144-145, 517 N.Y.S.2d at 934.

It is far from clear that the decision in *Ronald F.F.* and the decision in this case are in conflict at all. There is no necessary inconsistency between the "exceptional circumstances" Due Process analysis used by the New Jersey Supreme Court in this case and the compelling interest test used by the New York Court in *Ronald F.F.* Compare, 163 N.J. at 219 with 70 N.Y.2d at 144-145. And in any event, the decision in this case and the decision in *Ronald F.F.* hardly provide the kind of focused, serious disagreement about a constitutional question that would provide a rationale for intervention by this Court. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Powell and Blackmun, J.J., commenting that *certiorari* was properly denied in case about constitutional limits on use of preemptory challenges to exclude members of minority groups from juries until the issue was more fully developed in state courts which had been considering it).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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